CMS Energy Sdn Bhd v Poscon Corp

HIGH COURT (KUCHING) — SUIT NO 22–74 OF 2008–II
ABDUL AZIZ ABD RAHIM J
15 OCTOBER 2008

Arbitration — Agreement — Reference of dispute — Plaintiff granted ex parte injunction order to restrain defendant from continuing with arbitration proceedings — Whether defendant could rely on arbitration clauses in purchase orders to commence arbitration proceedings against plaintiff — Whether arbitration proceedings would put plaintiff to unnecessary loss, damage and inconvenience — Arbitration Act 2005, ss 10 & 18

Arbitration — Stay of proceedings — Application — Power of court to stay proceedings to refer dispute to arbitration — Arbitration Act 2005, ss 10 & 18

The plaintiff applied for and obtained an ex parte injunction order on an urgency certificate to restrain the defendant from proceeding with any arbitration proceedings against the plaintiff in respect of a sum of RM3,337,029 ('the debt'), which was a debt alleged to be due to the defendant from the plaintiff. In its affidavit filed in support of the ex parte injunction application, the plaintiff averred that the defendant's claim of a contract between the plaintiff and the defendant, giving rise to the debt, was without merits and unjustified and that therefore its claim against the plaintiff was frivolous, vexatious and an abuse of process. The plaintiff also claimed that the arbitration proceedings would put the plaintiff to unnecessary loss, damage and inconvenience. Although the plaintiff was granted the injunction order, the court at the same time ordered that an inter parte hearing be held to consider the matter further. At the inter parte hearing evidence was adduced by the plaintiff to show that the plaintiff together with the defendant, which was a Korean company based in Korea, and another company called Special Triumph Sdn Bhd had set up a joint venture company and that a subcontract was awarded to this joint venture company. According to the plaintiff, this subcontract awarded to the joint venture company was then further subcontracted by the latter to the defendant. The plaintiff therefore submitted that on the evidence in this case the defendant could not rely on s 10 of the Arbitration Act 2005 because there was no arbitration agreement between the defendant and the plaintiff and that the arbitration, if any, was between the defendant and the joint venture company. However the defendant submitted that there was no joint venture company

as alleged by the plaintiff because, although it was initially intended that a joint venture company be set-up in relation to the project in the end this had not happened. Instead the defendant alleged that the plaintiff alone was awarded the subcontract and it had further subcontracted the subcontract to the defendant. The defendant further submitted that the purchase orders purportedly raised by the joint venture company were in fact issued by the plaintiff to the defendant in Korea. Since each of those purchase orders contained an arbitration clause, which fact was not disputed, the defendant in reliance on this arbitration clause had commenced arbitration proceedings against the plaintiff. The defendant therefore contended that the action by the plaintiff in coming to this court was premature because if the plaintiff was dissatisfied with the decision of the arbitrator it could appeal to the High Court against that decision of the arbitrator. The defendant had therefore applied for a stay of all proceedings and for this matter to be referred to arbitration. Thus the issue in the inter partes hearing was whether a joint venture company was formed for the purpose of the subcontract and, as a corollary to that issue, whether the contract for the purchase of goods for which payment is sought by the defendant was between the defendant and the plaintiff or between the defendant and the joint venture company.

Held, discharging the ex parte injunction order and allowing the application for stay with all costs:

(1) The language used in s 18(1) of the Arbitration Act 2005 (the Act) confers broad and wide powers on arbitration. It allows the arbitral tribunal to decide not only on the substantive issues raised before it but also on the point of preliminary objections as to its jurisdiction. Further more s 18 also allows any party to the arbitration who is not happy with the preliminary rulings by the arbitrator to appeal to the High Court against such rulings within 30 days of its receipt. As such there was no serious irreparable prejudice caused to be suffered by the plaintiff in this case if they submit to the arbitration proceedings (see para 16).

(2) If ss 10 and 18 of the Act are read together, there is an unmistakable intention on the part of the Legislature that the court should lean towards arbitration proceedings. Under s 10(1) of the Act, the court should stay all proceedings before it in respect of a matter which is the subject of an arbitration agreement and refer the parties to arbitration unless the court is satisfied that one of two conditions, as provided in that section, applies. However, in this case none of these conditions apply (see paras 17 & 18).

[Bahasa Malaysia summary

Plaintif memohon dan berjaya mendapatkan satu perintah injunksi ex parte berdasarkan sijil kecemasan untuk menahan defendan daripada meneruskan prosiding timbangtara terhadap plaintif bagi jumlah RM3,337,029 ('hutang tersebut'), yang merupakan hutang yang dikatakan tertunggak kepada defendan daripada plaintif. Dalam afidavit sokongan kepada permohonan injunksi ex partenya, plaintif menegaskan bahawa tuntutan defendan berkaitan kontrak antara plaintif dan defendan yang mewujudkan hutang tersebut, adalah tidak bermerit dan tidak berasas dan oleh itu, tuntutan terhadap plaintif adalah remeh, menyusahkan dan merupakan penyalahgunaan proses. Plaintif juga berhujah bahawa prosiding timbangtara akan membuatkan plaintif mengalami kerugian dan kesulitan. Walaupun plaintif telah diberikan perintah injunksi tersebut, mahkamah walau bagaimanapun memerintahkan pendengaran inter parte diadakan bagi mempertimbangkan perkara itu dengan lebih lanjut. Semasa pendengaran inter parte tersebut, keterangan dikemukakan oleh plaintif menunjukkan bahawa plaintif, bersama defendan, sebuah syarikat Korea yang berpusat di Korea, dan sebuah lagi syarikat, iaitu Special Triumph Sdn Bhd telah menubuhkan sebuah syarikat usahasama. Suatu subkontrak telah diberikan kepada syarikat usahasama ini. Menurut plaintif, subkontrak tersebut kemudiannya diberikan oleh syarikat usahasama tersebut kepada defendan. Oleh itu plaintif menyatakan bahawa menurut keterangan dalam kes ini, defendan tidak boleh mengguna pakai s 10 Akta Timbangtara 2005 sebab tiada perjanjian timbangtara antara defendan dan plaintif. Malah, jika ada pun timbangtara, seharusnya antara syarikat usahasama tersebut dan defendan. Walau bagaimanapun, defendan berhujah bahawa syarikat usahasama seperti yang dikatakan oleh plaintif tidak wujud kerana, walau pun pada mulanya memang ada niat menubuhkan syarikat usahasama bagi tujuan projek tersebut, namun pada akhirnya, tidak ditubuhkan. Malah, defendan mendakwa bahawa plaintif yang diberikan subkontrak tersebut dan plaintif yang memberikan subkontrak tersebut kepada defendan. Defendan seterusnya menyatakan bahawa pesanan pembelian yang dikatakan dibuat oleh syarikat usahasama sebenarnya dikeluarkan oleh plaintif kepada defendan di Korea. Memandangkan setiap pesanan pembelian mengandungi klausa timbangtara, fakta yang mana tidak dipertikaikan di sini, mengguna pakai klausa timbangtara ini, defendan memulakan prosiding timbangtara terhadap plaintif. Defendan berhujah bahawa tindakan plaintif membawa kes ini ke mahkamah adalah terlalu awal kerana jika plaintif tidak berpuas hati dengan keputusan penimbangtara, plaintif boleh merayu ke Mahkamah Tinggi. Maka, defendan memohon penggantungan kesemua prosiding dan perkara ini dirujuk ke timbangtara. Oleh itu, isu dalam pendengaran inter parte ialah sama ada sebuah syarikat usahasama ditubuhkan bagi tujuan subkontrak tersebut, dan ekoran daripada isu tersebut, sama ada kontrak

pembelian barangan yang mana pembayarannya dituntut oleh defendan adalah antara defendan dengan plaintif atau antara defendan dengan syarikat usahasama tersebut.

Diputuskan, membatalkan perintah injunksi ex parte dan membenarkan permohonan penggantungan dengan kos:

(1) Bahasa yang digunakan dalam s 18(1) Akta Timbangtara 2005 ('Akta tersebut') memberikan kuasa yang luas dan menyeluruh kepada timbangtara. Pernyataan itu membenarkan tribunal timbangtara memutuskan bukan sahaja isu-isu substantif tetapi juga bantahan awal berkaitan dengan bidang kuasanya. Tambahan pula, s 18 membenarkan pihak-pihak kepada timbangtara yang tidak berpuas hati dengan keputusan awalan oleh penimbangtara merayu kepada Mahkamah Tinggi terhadap keputusan itu dalam masa 30 hari selepas keputusan itu diterima. Maka, tidak ada prejudis yang serius yang dialami oleh plaintif dalam kes ini jika plaintif meneruskan prosiding timbangtara tersebut (lihat perenggan 16).

(2) Jika ss 10 dan 18 Akta tersebut dibaca bersama, boleh dilihat bahawa adalah niat Badan Perundangan bahawa mahkamah seharusnya memberi ruang pada prosiding timbangtara. Di bawah s 10(1) Akta tersebut, mahkamah seharusnya menggantung semua prosiding jika perkara yang dibawa di hadapannya tertakluk kepada perjanjian timbangtara dan merujuk perkara tersebut kepada timbangtara. Kecuali, jika mahkamah mendapati bahawa perkara tersebut memenuhi dua syarat yang dinyatakan dalam seksyen itu. Tetapi, dalam kes ini, syarat-syarat tersebut tidak terpakai (lihat perenggan 17 & 18).]

Notes

For cases on application, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1488–1527.

For cases on reference of dispute, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1222–1231.

Cases referred to

Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281 (folld)

Legislation referred to

Arbitration Act 2005 ss 10, 10(1), 10(1)(a), 10(1)(b), 18(1)

Sim Hui Chuang (Lim Lip Sze with him)(Reddi & Co Advocates) for the plaintiff.

Thomas Shankar Ram (Thomas Shankar Ram & Co Advocates) for the defendant.

Abdul Aziz Abd Rahim J:

[1] On 25 April 2008 I granted an ex parte injunction order applied by the plaintiff on an urgency certificate [encl 5] to restrain the defendant from initiating, proceeding or continuing any arbitration proceeding against the plaintiff in respect of or for the sum of RM3,337,029 or any other sum or debt alleged to be due to the defendant from the plaintiff in respect of letter of award dated 4 May 2005, the purchase order dated 14 July 2005 and purchase order dated 22 July 2005 issued by the plaintiff/POSCON/Special Triump JV to the defendant and I ordered that the inter parte hearing be held on 12 May 2008. However due to circumstances beyond the control of the parties and at times with the consent of the parties the inter parte hearing had been adjourned several times. Finally on 25 September 2008 the inter parte hearing was heard. This is the ruling on that inter parte hearing.

[2] In the affidavit affirmed by Ian Graham Stadler on 21 April 2008 filed by the plaintiff in support of the ex parte injunction application, the plaintiff averred that the defendant's claim of a contract between the plaintiff and the defendant is without merits and unjustified. The plaintiff on the other hand had averred that the contract was between the defendant and a joint venture formed by the plaintiff, defendant and one Special Triump Sdn Bhd. Therefore the plaintiff contended that the defendant's claim is frivolous and vexatious and an abuse of process. And that the arbitration proceedings would put the plaintiff to unnecessary loss, damage and inconvenience. The plaintiff also gave the usual undertaking as to damages.

[3] At the inter parte hearing, counsel for the defendant tendered a chart exh A that shows the relationship between the parties relevant to this suit for ease of reference. From the chart in exh A it shows that Assar Chemicals Sdn Bhd awarded a contract ['the project'] to Chiyoda Malaysia Sdn Bhd/PPES Works (Sarawak) Sdn Bhd. Up to this point there is no dispute. However the chart shows that Chiyoda Malaysia then awarded the subcontract to a certain party. The plaintiffs contention is that the subcontract was awarded to CMS Energy Sdn Bhd/Poscon Corporation/Special Triumph Sdn Bhd JV. But the defendant's contention is that the subcontract was awarded to the plaintiff alone; there was no JV company as bandied by the plaintiff. The issue as to whom was the subcontract awarded is the contentious issue — hence whether there is or is not JV company formed for the purpose of the subcontract. Looking at the chart exh A, it shows that whoever had the subcontract later further subcontracted the subcontract to the defendant. This is where the divergence in contention of the parties occurs. The plaintiff contended that the subsubcontract was between the JV company and the defendant. Whereas

the defendant contended the subsubcontract was between the defendant and the plaintiff only; the defendant said that the arbitration was based on this subsubcontract.

[4] The defendant is a Korean company based in Korea. The defendant contended that the purchase orders purportedly issued by the JV company were in fact issued by the plaintiff to the defendant in Korea. Each of the purchase orders contains an arbitration clause. This fact is not disputed. The defendant is relying on this arbitration clause in commencing the arbitration proceedings.

[5] Perusal of the defendant's brief chronology of event, it shows that the defendant, through the firm of Allen & Overy in Hong Kong had commenced the arbitration proceedings. This is evident by exhs IGS-6, IGS-7 and IGS-8. This was before the granting of the ex parte order which was on the 24 May 2008 and before the plaintiff filed their writ of summons and statement of claim which was on 28 April 2008. Then on 30 May 2008 the defendant entered conditional appearance followed by the filing of summons in chambers — encl 31 on 15 July 2008 for stay of the present action pending the outcome of the arbitration proceedings. These chronologies of events are not challenged by the plaintiff.

[6] As to the existence of a JV company that got the subcontract and later allegedly awarded the subsubcontract to the defendant, the plaintiff pointed to exh IGS-3 in encl 2 and contended that this is the joint-venture agreement that formed the JV company. Learned counsel for the plaintiff submitted that the heading in exh IGS-4 shows that there is a joint venture company and the exhibit was signed on behalf of the joint venture. He further submitted that exh IGS-5 in encl 2 shows the same thing.

[7] Learned counsel for the plaintiff submitted that on the evidence in this case the defendant cannot rely on s 10 of the Arbitration Act 2005 because firstly, there is no arbitration between the defendant and the plaintiff; the arbitration if any is between the defendant and the JV company. Secondly, the defendant had taken step by entering appearance and has filed application to set aside the plaintiff's writ for service outside jurisdiction but later withdrew the application and the matter remained in court. Then the defendant took another action to set aside the injunction.

[8] In this case the purchase orders were directed at the defendant and the defendant did supply the goods. This fact is not in dispute. The defendant contended that it commenced arbitration based on the arbitration clause in

the purchase orders which constituted the contracts for the purchase of the goods ordered and the goods were delivered but were not paid for. This fact is also not disputed.

[9] Learned counsel for the defendant submitted that the defendant ought not to be denied the right to invoke the arbitration clause. He also submitted that the issue as to the validity of the sub subcontract from the plaintiff to the defendant is a subject matter within the purview or jurisdiction of the arbitrator and so is the purported pre-bid agreement which the plaintiff contended is the JV agreement. He further submitted that the plaintiff has not shown to this court that the arbitration proceedings is oppressive and would cause serious irreparable prejudice to them and that the plaintiff has not identified what sort of prejudice they will suffer if they submit themselves to the arbitration proceedings. He argued that if the plaintiff is dissatisfied with the decision of the arbitrator, the plaintiff can appeal to the High Court against that decision. So he submitted the plaintiff is in no way prejudiced.

[10] Learned counsel also submitted that the action by the plaintiff in coming to this court is premature. He argued that the arbitrator ought to be given the chance to consider whether it has jurisdiction to hear the matter or at the very least the plaintiff ought to go before the arbitrator to ask for the stay of the arbitration proceedings. He submitted that under new provisions of the new Arbitration Act 2005 the court should lean towards a stay and give way to arbitration proceedings and not allow abrogation of its very useful provisions meant to facilitate quick adjudication of disputes especially when it involves foreign companies. Under the new Arbitration Act 2005 the arbitrator has broad and wide jurisdiction.

[11] As to the existence of a JV company, learned counsel for the defendant submitted that the purported JV bandied by the plaintiff's counsel is in reality not a JV; but merely unincorporated body of three companies that came together for the purpose of the project. There is no JV. All the documents, exh IGS-3, etc and the purchase orders were signed by one Henry Toyad, an employee of the plaintiff. This fact is also not denied by the plaintiff. Learned counsel for the defendant further submitted that a closer scrutiny of the purport JV shows that there is no JV account or JV committee or a JV manager to manage the JV.

[12] The facts on which the defendant relied on for its application in encl 31 and in opposition to the ex parte injunction in encl 5 were deposed in the affidavit by Mr Lee affirmed on 10 July 2008. There is no reply to this affidavit. Therefore on the authority of *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281 CA the assertions of the facts deposed therein must be taken as the truth and admitted by the plaintiff. In the affidavit, it was

deposed that Special Triumph Sdn Bhd, the plaintiff and the defendant initially intended to form a cooperative association or joint venture in relation to the project, but did not in the end do so. One, Mr Young Jun Yoon, a director of Special Triumph Sdn Bhd at the time the project was under way, was also aware of what took place, including the purported JV which do not exist. It was also deposed that the defendant executed or authorised the execution of the purported pre-bid agreement — exh IGS-2 — allegedly to constitute the purported joint venture. It was deposed that the defendant had never seen the document until it was exhibited in the Ian Graham Stadler's affidavit filed in support of the plaintiff's application in encl 5.

[13] The defendant also deposed in the affidavit that there was and is no person named 'Kho SB' the alleged signatory of the purported JV agreement, employed by the defendant at the time the purported JV agreement was allegedly executed which was on 21 March 2005. There is however one Mr Ko Sang Bae, who at the material time was the head of the project business at the defendant in charge of domestic and overseas plant business. But the defendant contended that Mr Ko did not execute the purported JV agreement and had never seen it until it was exhibited. To prove this point the defendant exhibited LCJ-2 which consisted of a bundle of various agreements signed by Mr Ko, in Mr Lee's affidavit. Learned counsel for the defendant pointed out that the signature on the documents in exh LCJ-2 is a genuine signature of Mr Ko; and this signature differs from the purported signature of Mr Ko in the purported JV agreement.

[14] Clearly therefore in this case one of the issues is the existent of the JV and whether the defendant did execute the purported JV agreement. Corollary to that is the issue whether the contract for the purchase of the goods for which payment is sought by the defendant is between the defendant and the plaintiff or that between the defendant and the JV company. The other question is that is the purported JV in reality only an unincorporated body of three companies as contended by the defendant. In my view these questions may be posed to the arbitrator and the arbitrator is competent to answer them.

[15] Section 18(1) of the Arbitration Act 2005 provides as follows:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[16] In my view the language used in that section confers on the arbitration a broad and wide powers to decide on issues raised before it — not only the substantive issues but also on the point of preliminary objections as to its jurisdiction. That section also allows any party to the arbitration who is not

happy with the preliminary rulings by the arbitrator to appeal to the High Court against such rulings within 30 days of its receipt.

[17] Section 10 of the same Arbitration Act provides as follows:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[18] In my view if s 10 and s 18 of the Act are read together there is no unmistakeable intention of the Legislature that the court should lean towards arbitration proceedings. Under s 10(1) of the Act, the court shall stay all proceedings before it in respect of a matter which is the subject of an arbitration agreement, and refer the parties to arbitration unless the court is satisfied as to any of the condition in para (a) or (b) of the section as shown above. And in this case none of the condition is applicable.

[19] For the above reasons, I shall allow the defendant's application in encl 31 for stay of all proceedings and refer the matter to arbitration. Accordingly I shall also order that the ex parte injunction given on the 25 April 2008 be discharge. Costs for the inter partes hearing and for encl 31 is given to the defendant. Costs to be taxed unless agreed.

Ex parte injunction order discharged. Application for stay allowed with costs.

Reported by K Nesan